Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1996

LESLIE AND DOROTHY BISHOFBERGER,

Petitioners,

vs.

PRUDENTIAL SECURITIES INCORPORATED,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court who certifies an expansive class definition that aids the defendant in circumventing its contractual and regulatory obligations to arbitrate should relax its standard in allowing persons who had already elected to arbitrate, who were engaged in arbitration, and who were not represented at the certification hearing, to opt out from the class after the deadline has passed?

LIST OF PARTIES BELOW

Appellants in the Second Circuit:
John D. Toland, Christal Toland (deceased), MacDaniel Jackson, Miriam Jackson, Matt Nilson, David Matus, Melinda Matus, Carl Roba, Vincent Lazara, Jay Jablonski, James Barrett, Jeffrey Schiller, Leslie Bishofberger, and Dorothy Bishofberger.

Appellee in the Second Circuit:
Prudential Securities Incorporated.

LIST OF AFFILIATED ENTITIES

The Prudential Insurance Company of America (parent corporation)

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OPINIONS BELOW

The opinion below of the Second Circuit Court of Appeals and of the United States District Court for the Southern District of New York are unreported. The opinion of the Court of Appeals is reprinted in the Appendix to the related Petition for Certiorari in No. 96-1538 filed by John D. and Christal Toland ("Toland Petition"), beginning at Toland App. 1. The District Court's order as to these Petitioners is reproduced *infra*, at App. 1.

JURISDICTION

The summary order of the Second Circuit affirming the district court was entered on December 27, 1996 (Toland App. 1). Following a timely petition, the Second Circuit entered an order denying rehearing on January 27, 1997 (Toland App. 58). This petition, as well as the Toland Petition, have been filed within ninety days following the entry of the order denying rehearing, as permitted by Rule 13.3 of the Rules of this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves the interpretation and application of the following rule:

Rule 60. Relief from Judgment or Order

. . .

(b) On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. . . .

STATEMENT OF THE CASE

This petition seeks review of a summary order of the Second Circuit Court of Appeals affirming the denial, by the United States District Court for the Southern District of New York, of petitioners' motion under Rule 60 (b), Fed.R.Civ.P., to be excluded from a previously certified class. Jurisdiction in the district court was based on the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*

In the early 1980's petitioners, Leslie and Dorothy Bishofberger, were sold $266,000 worth of interests in private limited partnerships sponsored by the respondent Prudential Securities Incorporated (PSI). In October 1993, the Securities Exchange Commission and PSI entered into a consent decree that established a special claims procedure to make restitution to those customers who could show, without taking into account any statute of limitations defense, that they had been sold unsuitable partnership investments. Acting through their stockbroker, the Bishofbergers submitted a claim in the SEC proceedings.

PSI rejected their claim. In June 1995 the Bishofbergers signed forms to elect expedited arbitration of their claim in accordance with the SEC's procedures. As before, they sent their forms to their broker, who was no longer with PSI, to fill in the details of their investments and to submit the forms to the claims administrator. The next day, however, their broker was hospitalized with a heart attack. Their papers apparently never reached the claims administrator.

The Bishofbergers were unaware of what had happened, and believed that they were in the SEC's expedited arbitration process. When they received a notice of the pendency of a class action against PSI in the Southern District of New York, they read in the notice that they were automatically excluded if they had previously elected to join the SEC proceedings. Because they had done so, they took no action to opt out of the class.

Some weeks later, they spoke to their broker and asked him about their expedited arbitration. He checked with his office, but could not determine what had happened to their submission papers. He came to their home and had them fill out a duplicate set. He told them what to write in a letter to explain the reason for the late submission, and they sent the package off to the claims administrator. That official forwarded a copy of the papers to PSI, who received them on October 16, 1995.

An in-house attorney for PSI contacted the Bishofbergers two weeks later to obtain more details of their excuse for late submittal. They told him about their broker's heart attack. He told them that they should do nothing until they got a ruling on their late submission.

Instead of passing on the details about the heart attack to the claims administrator, however, PSI's attorney recommended only that the Bishofbergers' late submittal be rejected because it had been "postmarked after the deadline." The claims administrator did not contact the Bishofbergers, but simply sent a notice of rejection based on PSI's recommendation. By the time the Bishofbergers received the rejection, the deadline to opt out of the class had passed. Their broker referred them to an attorney, who filed a motion on their behalf under Rule 60(b), Fed.R.Civ.P., to exclude them from the class so that they could apply to the claims administrator for relief. (The judgment in the class action barred them from pursuing any remedy in any other forum [Toland App. 39, at ¶ 6].) The district court held that the Bishofbergers should have taken the precaution of opting out of the class before the October 30 deadline, and denied their motion. The court of appeals, while noting that the Bishofbergers' situation was "unusual", affirmed on the ground that the district court had not abused its discretion in denying relief from its judgment under Rule 60 (Toland App. 21-23).

REASONS FOR GRANTING REVIEW

This Court Should Act to Limit Abuses of the Class Action Notice Procedure

The narrow issue before this court is whether the district court abused its discretion in denying the Bishofbergers the right to opt out of the class after the initial deadline had passed. PSI stressed that because of an option to cancel out of its proposed settlement which it

had reserved in the event that too many individuals opted out, it would be prejudiced by the late exclusion of the Bishofbergers. Although the district court agreed with PSI, its order did not take into account the fact that PSI already had in its hands the Bishofbergers' papers submitting their claim to the SEC when its counsel told them to "do nothing" while waiting for the claims administrator to act. PSI could not rationally claim that it would be prejudiced by allowing the Bishofbergers to proceed in the forum which it knew they had previously elected. The same is true of the other appellants below, who were already in private arbitrations with PSI when the opt-out deadline passed.

This case is about more than the legal sufficiency of excuses offered under Rule 60, however. It is impossible to review the discretion exercised below without at the same time reviewing what happened before the deadline for opting out had passed. While the earlier orders certifying the class and finding the proposed settlement fair and reasonable are not at issue here, it is the district court's refusal to exclude petitioners from their operation that requires them to be examined in the context of petitioners' individual situations. When that is done, the abuse of discretion that occurred becomes manifest.

The record in this case demonstrates a gross abuse of class action notice procedures under Fed. R. Civ. P. Rule 23. This Court should exercise its power of review in order to rein in excesses of the type that occurred below, which were given only cursory review by the Court of Appeals in an unpublished summary order. *See* Rule 10(a) of the Rules of this Court; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-76 (1974); *Mullane v. Central Hanover Bank &*

Trust Co., 339 U.S. 306, 314-18 (1950). Consider the roles played by:

(a) *Defendant Prudential Securities Incorporated* ("PSI"), which was accused by the Securities and Exchange Commission ("SEC") of bilking hundreds of thousands of public customers in the sale of limited partnerships in the 1980's. As a member of the securities industry, it had supported the enforceability of standard industry arbitration clauses in customer agreements, which were upheld by this Court for the first time in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). Notwithstanding those agreements to arbitrate, PSI below used the power of the District Court under Rule 23 to nullify arbitration proceedings against it that had been ongoing for more than two years, and in which claimants, the Tolands, had invested $100,000. In a number of other cases consolidated for appeal below, PSI used the broad class definition to sweep in a number of its own former sales representatives who were in the middle of arbitrating employment claims, not partnership investment claims, with their employer PSI. Without actual notice of the class proceedings in several instances, all of the former PSI employees were determined to be included in a class that (a) contained not one representative member who was a present or former PSI employee, and (b) afforded no relief for the type of claims which they were then arbitrating. The district court held, and the Court of Appeals affirmed, that persons who had no actual notice of the proceedings and who did not have claims typical of the class nevertheless were bound, at their peril, to show up at the fairness hearing and present their objections to the scope of the class!

In the case of these petitioners, the Bishofbergers, PSI was able to get the district court to make a nullity of their continuing attempts to participate in an expedited arbitration procedure established by the SEC for the benefit of defrauded PSI customers. The class notice sent to them told them that they were excluded from the class if they had previously elected the SEC claims administration procedure. They had done everything humanly possible to make that election by the class opt-out date. Nevertheless the district court held, and the Court of Appeals affirmed, that despite the express language of the class notice they were in retrospect required not only affirmatively to elect the SEC's forum, *but also* to opt out of the New York class before the deadline.

In this manner, PSI was able to escape from the terms of its own arbitration agreements, and even from the terms of a consent decree it had negotiated with the SEC. It yanked the petitioners, both represented (the Tolands) and unrepresented by counsel (the Bishofbergers), out of their elected arbitrations by negotiating a dragnet class definition that no one was present to oppose.

The second major role was played by:

(b) *Class plaintiffs and their counsel,* public customers who had not chosen arbitration in front of any forum, but who were financially interested in having as big a class as possible, and who therefore cooperated with PSI in defining the class so broadly that it swept up people like the Tolands who were in ongoing industry arbitration proceedings; people like the Bishofbergers who were doing all they could to join the expedited proceedings set up by the SEC; and people who were not even investors, but

present and former employees of PSI who happened to have complaints against PSI based on their employment contracts, which also contained mandatory arbitration clauses.

Finally, there was:

(c) *The District Court itself,* which approved the class definition proposed by PSI and the named plaintiffs without the benefit of objections from any of the other classes of persons included in its sweep. Having engaged in the fiction that misdirected and undelivered notices were legally adequate, it went on to chastise those who never got the notices for not appearing and objecting to their inclusion in the class. The result was a Kafkaesque proceeding in which those who did not represent the interests of the absent petitioners were allowed to act as if they had done so, and those who did not object for the very good reason that they either had no notice, or read the notice to mean that they were excluded, were held accountable for failing to appear and object.

These were all of the active participants in the proceedings below. Not one of them could be expected to represent fairly or adequately the interests of these particular petitioners. What is equally not surprising is that all of them have circled the wagons in defending the procedural excesses for which they are jointly responsible.

It is unreasonable to expect that a plaintiff who brings a class action will narrow or restrict the definition of the class if the defendant also has an interest in sweeping in as many potential adversaries as possible. In such a circumstance, both sides have their own reasons for

wanting the class made as large as the court will allow. Absent objective opposition, the court has no way of perceiving the unjust consequences of its certifying the proposed class. When it caps its arbitrary creation of a class with a "tough . . . exercise of discretion" (Toland App. at 16) in adjudicating Rule 60 motions for late exclusion, the court gives the impression that it is colluding with the named parties to achieve a one-sided result. The result is a process that transforms the class action from a vehicle to aid those who are too weak to obtain individual relief into a sword to punish those who are already obtaining their own individual relief. This was not the intent of Rule 23. Only this Court is in a position, by granting certiorari in this case and by reversing the orders denying late opt-outs, to put reasonable limits on the excesses of power asserted by the courts below.

CONCLUSION

Having fashioned an extremely broad class via a stipulation between PSI and the named class representatives, the district court was obliged to see that the judgment did not operate unfairly to prejudice parties who had already affirmatively elected an alternative forum. It failed to protect the interests of those who received inadequate notice, and by refusing late opt-outs to these and other petitioners, transformed the class action into a tool that PSI was able to use to evade its contractual and regulatory obligations to arbitrate. For the reasons given

in the preceding section, the Court should grant this petition for certiorari.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PRUDENTIAL SECURITIES INCORPORATED LIMITED PARTNERSHIPS LITIGATION	MDL Docket No. 1005 M-21-67 (MP) ORDER NO. 57

ORDER

(Filed Jan. 30, 1996)

Leslie and Dorothy Bishofberger (the "Bishofbergers") having moved this Court for an order determining that they are excluded from the class certified therein; or, alternatively, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, for relief from this Court's November 20, 1995 Order and Final Judgment; and for an order excluding them from the class; it is hereby

ORDERED that the Bishofbergers are Class Members in this action and accordingly are bound by this Court's November 20, 1995 Order and Final Judgment; and it is further

ORDERED that the Bishofberger's motion is denied in its entirety.

Dated: New York, New York
January 30, 1996

/s/ Milton Pollack
MILTON POLLACK
SENIOR UNITED STATES
DISTRICT JUDGE